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PP

v.

DENISH MADHAVAN

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FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
AUGUSTINE PAUL FCJ
ABDUL AZIZ MOHAMAD FCJ
[CRIMINAL APPEAL NO: 05-72-2005(J)]

C

5 DECEMBER 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal by prosecution against lesser conviction and sentence of possession - Admissibility of statements - Defence - Proof of knowledge - Presumption of trafficking under s. 37(da)(vi) - Whether correctly invoked*

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The respondent was convicted by the High Court of the offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') of trafficking in 3,121 grams of cannabis, and was sentenced to death under s. 39B(2) of the Act. On his appeal, the Court of Appeal set aside the conviction and sentence, substituting them with a conviction for the offence of possession of the drug under s. 6 of the Act and a sentence of 15 years' imprisonment and whipping of ten strokes under s. 39A(2) of the Act. Hence, the present appeal by the Public Prosecutor seeking confirmation of the conviction and sentence of the High Court. The respondent was arrested at a house in a raid by a party of customs officers, led by one Raja Abdul Aziz ('Raja Aziz'). After Raja Aziz was admitted into the house, the respondent made several statements in answer to certain questions from Raja Aziz. A trial-within-a-trial was conducted to determine the admissibility of those statements, which resulted in a finding of admissibility. In the present appeal, the appellant relied on only one oral statement, which was the respondent telling Raja Aziz, when asked the whereabouts of any other cannabis, that the drug was under the bed in the respondent's room. There were several bags under the bed, which when brought out were found to contain the drug in question. The trial judge found that the respondent was in possession of the drug and invoked the presumption of trafficking under s. 37(da)(vi)

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of the Act against him. The Court of Appeal's main reason for allowing the respondent's appeal was that, on the evidence, someone other than the respondent could have concealed or planted the drug in the respondent's bags. In this appeal, the appellant's primary aim was to show that the respondent was in possession of the cannabis in his bags and that, therefore, by reason of the amount, he was presumed to be trafficking in the cannabis, and that it was irrelevant to entertain the theory that someone else had access to the respondent's room and had placed the cannabis in his bags without his knowledge. The respondent, however, submitted against the trial judge's reasons for admitting, after the trial-within-a-trial, the respondent's oral statements made to Raja Aziz on the night of the raid, which included the statement that the rest of the cannabis was under the bed.

Held (allowing the appeal; setting aside the orders of the Court of Appeal, and confirming the conviction and sentence of the High Court)
Per Abdul Aziz Mohamad FCJ delivering the judgment of the court:

(1) The oral statements made by the respondent to Raja Aziz on the night of the raid were, in this court's judgment, properly admitted. The statement about the cannabis being under the bed meant that the respondent knew of the existence of the cannabis in his bags. The trial judge was thus right in finding that the respondent was in possession of the cannabis. In fact, even if the respondent's statement were to be overlooked, the fact that the respondent, in the circumstances, brought out from under the bed the bags containing the cannabis was itself sufficient as complete and direct proof that he had knowledge of the existence of the cannabis in the bags and was, therefore, in possession of it. With such proof of knowledge, it was unavailing as a defence to suggest that the presence of the cannabis in the respondent's bags was the result, unknown the respondent, of the work of someone who had access to the house and the respondent's room. (para 25)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden telah disabit oleh Mahkamah Tinggi atas satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') iaitu mengedar 3,121 gram kanabis, dan telah dikenakan hukuman mati
B di bawah s. 39B(2) Akta. Atas rayuannya, Mahkamah Rayuan mengenepikan sabitan dan hukuman yang dikenakan, dan menggantikan mereka dengan suatu sabitan untuk kesalahan memiliki dadah di bawah s. 6 Akta dan suatu hukuman penjara selama 15 tahun dan sepuluh pukulan di bawah s. 39A(2) Akta.
C Oleh itu, Pendakwa Raya membuat rayuan ini menuntut pengesahan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi. Responden telah ditangkap di sebuah rumah dalam satu serbuan yang dibuat oleh sesuatu pihak pegawai-pegawai kastam, yang diketuai oleh seorang yang bernama Raja Abdul Aziz ('Raja
D Aziz'). Selepas Raja Aziz dibenarkan masuk dalam rumah itu, responden telah membuat beberapa pernyataan yang merupakan jawapan kepada beberapa soalan yang ditanya oleh Raja Aziz. Sesuatu perbicaraan-dalam-perbicaraan telah dilakukan untuk menentukan keboleh-terimaan pernyataan-pernyataan itu, yang
E mana keputusannya ialah pernyataan-pernyataan itu boleh diterima. Dalam rayuan ini, perayu bergantung kepada hanya satu pernyataan lisan, iaitu di mana responden memberitahu Raja Aziz, apabila ditanya tentang di mana kanabis lain disimpan, bahawa dadah itu adalah di bawah katil dalam bilik responden. Terdapat
F beberapa beg di bawah katil itu, yang apabila dikeluarkan didapati mengandungi dadah tersebut. Hakim perbicaraan membuat keputusan bahawa responden mempunyai milikan dadah itu dan menggunakan anggapan mengedar di bawah s. 37(da)(vi) Akta ke atasnya. Sebab utama Mahkamah Rayuan membenarkan rayuan
G responden ialah kerana, mengikut keterangan, orang selain dari responden mungkin telah menyembunyikan atau meletakkan dadah itu dalam beg-beg responden. Dalam rayuan ini, tujuan utama perayu ialah untuk menunjukkan bahawa responden mempunyai milikan kanabis dalam beg-begnya dan, oleh itu, disebabkan
H amaunnya, beliau dianggap mengedar kanabis itu, dan bahawa ia tidak relevan untuk melayani teori bahawa orang lain mempunyai akses ke bilik responden dan telah meletakkan kanabis dalam beg-begnya tanpa pengetahuannya. Responden, walau bagaimanapun, menghujah terhadap sebab-sebab hakim perbicaraan menerima,
I selepas perbicaraan-dalam-perbicaraan, pernyataan lisan yang disebut kepada Raja Aziz pada malam serbuan itu, yang termasuk pernyataan bahawa kanabis yang lain adalah di bawah katil.

Diputuskan (membenarkan rayuan; mengenepikan perintah-perintah Mahkamah Rayuan, dan mengesahkan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi)
Oleh Abdul Aziz Mohamad HMP menyampaikan penghakiman mahkamah:

(1) Pernyataan-pernyataan lisan yang disebut oleh responden ke Raja Aziz pada malam serbuan itu telah, dalam penghakiman mahkamah ini, diterima dengan betul. Pernyataan tentang adanya kanabis di bawah katil itu bermaksud bahawa responden mengetahui tentang kewujudan kanabis dalam beg-begnya. Hakim perbicaraan, oleh itu, memutuskan dengan betul bahawa responden mempunyai milikan atas kanabis itu. Sebenarnya, jikapun pernyataan responden tidak diendahkan, fakta bahawa responden, dalam halkeadaan sebegitu, telah membawa keluar dari bawah katil beg-beg yang mengandungi kanabis itu adalah mencukupi selaku bukti yang penuh dan terus bahawa beliau mengetahui tentang kewujudan kanabis dalam beg-beg itu dan, oleh itu, mempunyai milikan atasnya. Dengan bukti pengetahuan sebegitu, ia tidak dapat digunakan sebagai pembelaan untuk mencadangkan bahawa adanya kanabis dalam beg-beg responden ialah hasil, yang tidak diketahui oleh responden, kerja seseorang yang mempunyai akses ke rumah itu dan bilik responden.

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 ***(refd)***
Leow Nghee Lim v. Reg [1955] 1 LNS 53 HC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 37(da)(vi), 37A, 39A(2), 39B(1)(a), (2)

Other source(s) referred to:
Stephen's Digest, 9th edn, p 304

For the appellant - Wong Chiang Kiat DPP
For the respondent - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co

[Appeal from Court of Appeal; Criminal Appeal No: J-05-97-2003]

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Mohamad FCJ:

[1] The respondent was convicted at the High Court at Johor Bahru of the offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 of trafficking in 3,121 grammes of cannabis, a dangerous drug, and was sentenced to death under s. 39B(2) of the Act. On his appeal, the Court of Appeal set aside the conviction and sentence and substituted them with a conviction for the offence of possession of the drugs under s. 6 of the Act and a sentence of 15 years' imprisonment and whipping of ten strokes under s. 39A(2). The Public Prosecutor now appeals to this court for confirmation of the conviction and sentence of the High Court.

[2] The respondent was arrested in a raid on 17 September 1997 at about 10.15pm by a party of customs officers, led by Raja Abdul Aziz (PW4), on house No. 35, Jalan Sekoi, Bandar Baru Uda, Johor Bahru. The raid was actually on an extension of the main house. The extension had its own single entrance and was rented by the respondent from the owner of the main house. The respondent occupied one room of the extension. There was another room adjoining the respondent's room. Whenever we make mention of the house after this, we mean the extension.

[3] At the time of the raid the respondent was in his room with two other persons, who were to be witnesses for the prosecution. They were Rahmat bin Md. Munasir (PW7) and Najib bin Mohd. Amin (PW8). From outside the house Raja Aziz saw them smoking what he suspected to be cannabis. Rahmat and Najib confirmed in evidence that the three of them were smoking cannabis. According to Najib, he had gone to the house to collect from the respondent money for a handphone that he had sold to the respondent, and to buy a packet of cannabis, which he did for RM10.

[4] After Raja Aziz was admitted into the house, the respondent made several statements in answer to certain questions from Raja Aziz. A trial-within-a-trial was conducted to determine the admissibility of these statements, which resulted in a finding of admissibility. The facts that we are going to relate are from Raja Aziz's examination in the trial proper.

[5] It was the respondent who came and opened the door of the house in response to Raja Aziz's knocks. In the hall or guest area, Raja Aziz asked the respondent a question, which was duly answered. Then Rahmat and Najib came out of the respondent's room to the hall or guest area. A body search was conducted on the three, and a packet of cannabis was found in a sling-bag which Najib had on him. Raja Aziz directed the respondent to go to his room which Raja Aziz intended to examine. On the floor of the room Raja Aziz noticed a plastic film case containing what proved to be cannabis. Rahmat and Najib were to testify that the cannabis that they and the respondent had been smoking was from that film case. After the finding of the film case, Raja Aziz administered to the respondent the caution under s. 37A of the Act, and the respondent was handcuffed.

[6] Raja Aziz then asked the respondent the whereabouts of any other cannabis. At first the respondent was silent, but when asked again he said that it was under the bed (ada di bawah katil). Raja Aziz saw several bags under the bed, and understood that the respondent meant it was in one or more of the bags. The respondent's handcuffs were then removed to enable him to bring out the bags that he meant. The respondent brought out three bags from under the bed, which Raja Aziz examined. In a red Umbro bag, among the respondent's personal effects, was half a slab of what proved to be cannabis. In a Slazenger bag, among the respondent's personal effects, was a slab of what proved to be cannabis. In a green bag were two slabs of what proved to be cannabis.

[7] The total weight of cannabis in the three and a half slabs and in the plastic film case was 3,121 grammes, the amount in the charge, the amount in the film case being only 8.2685 grammes.

[8] After the discovery of the drugs in the respondent's room, he made two more statements in answer to two questions from Raja Aziz.

[9] In the room adjoining the respondent's room were found 22 slabs of cannabis totalling in weight 17,156 grammes. This was not the subject of the charge against the respondent. That room had been occupied by one Ibrahim, nicknamed Boy, before the raid.

[10] On 21 September 1999 the respondent made a statement to the police, which was formally recorded (P29). It was admitted in evidence after a trial-within-a-trial to determine its admissibility, but it would appear to have been an unnecessary piece of evidence because the learned trial judge did not have recourse to it at all in making his findings against the respondent.

[11] The essential and basic finding of the learned trial judge was that the respondent was in possession of the drugs the subject of the charge – that is to say, that he had custody or control of them and knowledge of what they were – and therefore, by reason of their amount, he was presumed under s. 37(da)(vi) to be trafficking in them. Throughout his judgment, the learned trial judge qualified the possession that he found with the word "exclusive". This was inappropriate and unnecessary, as we shall explain later.

[12] The learned trial judge also found that trafficking of drugs was going on at the house. Apart from the fact that Najib bought of the respondent a packet of cannabis and that Najib and Rahmat were smoking cannabis with the respondent, supplied by the respondent from the film case, the finding of trafficking was made in reliance on evidence of the finding in the respondent's room of paraphernalia for packing and smoking cannabis and evidence that there had been a heavy traffic of youths going in and out of the house between 7.30pm and 12.30am on the four days before the raid during which the house was under surveillance. In connection with the finding of trafficking, the judge cited the definition of "trafficking" in s. 2 of the Act, which encompasses various acts which constitute actual trafficking as distinguished from trafficking by presumption from the amount of drug, but he did not state which of the acts would be applicable in this case and it is clear from a reading of the judgment as a whole that, in speaking of trafficking, the learned trial judge was not making a specific finding of actual trafficking by the respondent, besides a finding of trafficking by presumption, of the drugs in the charge, but was merely saying, as it were, that the house was a centre of drug-dispensing and drug-consuming activities involving the respondent, and that the use that the learned trial judge made of this was as a reinforcement of the evidence of knowledge on the part of the respondent of the existence and nature of the drugs in the charge, particularly those in the three bags, that is required to render the respondent to be

in possession of them, or the judge was merely saying, as it were, that it could be no mere coincidence that a man from whose house such activities were going on was found to have a large amount of drugs in bags kept under his bed.

[13] The evidence of knowledge as found by the learned trial judge, that was reinforced by the evidence of trafficking activities, comprised the facts that the drugs were of a large amount, that they were found in the respondent's room and that the respondent told Raja Aziz that they were under the bed, which is the only one of the respondent's oral statements that the appellant relies on in this appeal.

[14] The respondent's defence was that he had no knowledge of the presence of the cannabis in his room and therefore in law he was not in possession of it. He sought to establish his defence by relying on or resorting to evidence to show that Boy was still in occupation of the other room at the time of the raid and that another person, known as Razali or Botak, had a set of keys of the house and therefore had access to it and to the respondent's room.

[15] The question of others having access to the respondent's room was considered by the learned trial judge both after the close of the case for the prosecution and in evaluating the case after hearing the defence. The learned trial judge said that the matter of access by others was "to negative the proof of exclusive possession". Before us the respondent's counsel was candid enough as to what the respondent's aim was in seeking to show the probability of access by others as a matter negativing exclusive possession: it was to assert that the cannabis in the three bags under the bed could have been concealed or planted there by these other persons. The learned trial judge did not allow himself to be distracted by this suggestion of access by others from the evidence that he found to exist of "exclusive" possession of the cannabis on the part of the respondent. He did, nevertheless, make findings on the evidence relating to access by others. He found on the evidence that Boy had already ceased living at the house when it was raided. As regards Razali, he found there was no evidence that Razali had a set of the keys of the house although there was evidence that Razali had been entering the house to care for a hamster that was in a cage in the common or guest area.

[16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about "exclusive" possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, – that is, "exclusive" – that a conviction is possible. When the learned trial judge said "The accused sought to negative the proof of exclusive possession …", we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.

[17] The idea of exclusivity features in the meaning of "possession" in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v. Reg.* [1955] 1 LNS 53:

> … It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[18] Thomson J, in *Chan Pean Leon v. Public Prosecutor* [1956] 1 LNS 17, said that "possession" for the purposes of criminal law involves possession itself – which some authorities term "custody" or "control" – and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th edn, p. 304), in which the exclusive element mentioned by Taylor J appears:

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[20] Coming now to the Court of Appeal, they made decisions in three respects. First, they ruled that the respondent's statement recorded in exh. P29 was inadmissible. But the admissibility of the statement is irrelevant in this appeal because the learned trial judge, as we have said, did not rely on it and because in this appeal the appellant is not relying on it.

[21] Secondly, the Court of Appeal took the view "that exclusive possession has not been proven as there is a gap in the case for the prosecution". That view was taken in consequence of their finding that the prosecution had failed to exclude the possibility that Boy and Razali had access to the house and the respondent's room. That finding was made after noting that, on the facts and the evidence, the learned trial judge was wrong in his reasons for concluding that Boy had ceased to live at the house when the raid took place, and that the prosecution failed to call Boy and Razali as witnesses or offer them to the defence. Like the learned trial judge, the Court of Appeal also qualified possession by the word "exclusive". When the Court of Appeal said that "exclusive possession has not been proven" we take it that they meant no more than that the prosecution had failed to exclude the probability of the cannabis being placed in the respondent's bag by someone else without his knowledge and therefore of his being innocent of possession of the cannabis.

[22] Thirdly, the Court of Appeal felt that the learned trial judge should have treated Najib's evidence about buying cannabis from the respondent with caution and should have considered possible motives for the evidence since Najib and Rahmat were also arrested as suspects, although subsequently released.

[23] The decisions in those three respects constituted the Court of Appeal's reasons for allowing the respondent's appeal. The main reason was the second, which, put simply, is that, on the evidence, someone, other than the respondent, whether Boy or Razali or someone else, could have concealed or planted the drugs in the respondent's bags. It will be seen that the Court of Appeal did not at all deal with the learned trial judge's basic finding of possession, that is, of custody and knowledge, and his reasons for that finding, especially for the finding as to knowledge. Although the Court of Appeal did, in the third respect, remark on Najib's evidence about buying cannabis from the respondent, that, as we said, was part of the evidence of drug activities that the learned trial judge used to reinforce other circumstances that already proved knowledge, including the respondent's statement that the cannabis was under the bed. The Court of Appeal did not consider those other circumstances proving knowledge.

[24] The appellant's primary aim in this appeal has been to show that, on the evidence, the respondent was in possession of the cannabis in his bags, that is, that he was in custody of the cannabis and had knowledge of its presence, and that, therefore, by reason of the amount, he was to be presumed to be trafficking in the cannabis, and that, that being the case, it was irrelevant to entertain the theory that someone else had access to the respondent's room and placed the cannabis in his bags without his knowledge.

[25] In this appeal the respondent's counsel submitted against the learned trial judge's reasons for admitting, after the trial-within-a-trial, the respondent's oral statements made to Raja Aziz on the night of the raid, which includes the statement that the rest of the cannabis was under the bed. The submission questioned the veracity of Raja Aziz's evidence on the ground of certain perceived inconsistencies in the narrative of events between his evidence in the trial proper and his evidence in the trial-within-a-trial; sought to create doubt as to whether the required caution was administered; and questioned the voluntariness of the statements. We are not persuaded by the submission to hold that the statements were improperly admitted. In our judgment, they were. The statement about the cannabis being under the bed meant that the respondent knew of the existence of the cannabis in his bags. The learned trial judge was therefore right in finding that the

respondent was in possession of the cannabis. We will go a step further and say that, even were the respondent's statement to be overlooked, the fact that the respondent, in the circumstances that obtained, brought out from under the bed the bags containing the cannabis was itself sufficient as complete and direct proof that he had knowledge of the existence of the cannabis in the bags and was therefore in possession of it. With such proof of knowledge, it is unavailing as a defence to suggest that the presence of the cannabis in the respondent's bags was the result, unknown to the respondent, of the work of someone who had access to the house and the respondent's room.

[26] We therefore allow the appeal, set aside the orders of the Court of Appeal, and confirm the conviction and sentence of the High Court.